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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

No. 643

CHARLES SIMUS,

Petitioner,

vs.

FRANK E. DONOGHUE, JUDGE OF THE MUNICIPAL COURT OF CHICAGO,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Attorney for Respondent.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

CORRECTED STATEMENT OF MATTERS INVOLVED.

Petitioner is seeking a writ of certiorari to review a judgment of the Supreme Court of Illinois denying a writ of mandamus. The writ of mandamus was requested to compel respondent, a Judge of the Municipal Court of Chicago, to settle, sign, seal and certify and order filed a report of proceedings tendered by counsel for petitioner.

The Supreme Court of Illinois found itself to be without jurisdiction to issue a writ of mandamus to compel a judge of any court to sign a particular report of proceedings. *Simus* v. *Donoghue*, 377 Ill. 122 (1941).

By the present petition for writ of certiorari, petitioner is not seeking review of the Municipal Court judgment imposing a fine against him, so facts leading to this judgment against petitioner are of no significance now. However, to correct erroneous statements of petitioner, reference to such facts is made.

A report of proceedings was filed by respondent, which shows the true facts to be in substance as follows*:

Petitioner was brought to trial before respondent for violation of a city ordinance. Petitioner appeared in person. He was arraigned, and, upon inquiry, waived a trial by jury and announced that he was ready for trial. A police officer testified to the effect that petitioner "was found lying on the sidewalk at the southeast corner of Clark Street and Chicago Avenue in an intoxicated condition so that he was unable to walk, and that he was exposing his person." Petitioner testified in his own behalf to the effect that "he was intoxicated and that he was picked up at the corner of Chicago Avenue and Clark Street" and further that "he was a baker but that he did not know what happened that night."

The Court found him guilty of disorderly conduct and entered judgment against petitioner for $50.00 and $10.00 costs. The Municipal Code of Chicago provides for punishment by fine only (Municipal Code of Chicago, Chap. 193-1).

The Federal question raised by petitioner's motion for a new trial (Petition, p. 2) is not before this Court.

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*The report of proceedings is attached as an exhibit to respondent's answer to the petition for mandamus in the state court. No printed record has been served upon counsel for respondent pursuant to Rule 38 (3) of this Court. A motion to proceed on a typewritten record is pending but no copy of a typewritten record has been served upon respondent. For these reasons, respondent is unable to refer to pages in a printed or typewritten record.

A report of proceedings was prepared by counsel for petitioner, presumably in preparation for an appeal from the judgment imposing the fine. Respondent refused to approve the document presented to him as a correct report of the proceedings at the trial, and endorsed the document presented as "not a true and accurate statement of the facts in this case."

Thereupon, hearings were had to settle the report of proceedings. Petitioner's summary of the evidence introduced at these hearings is inaccurate.

Assistant State's Attorney Buchman, who was present at petitioner's trial, reviewed the report of proceedings tendered to respondent, and stated in open court:

> "I am positive that wasn't the case, that this is not the correct transcript of what took place."

Reference need be made to only one other example of inaccuracy. Respondent, in contradicting testimony that a certain officer was not present at the trial, stated: "the court has a distinct recollection of him being there."

Petitioner was afforded extended and full hearings to enable his counsel to submit a correct report of proceedings. Counsel refused to submit a correct report of procedings, which respondent indicated would be signed.

Thereupon, original mandamus proceedings were started in the Supreme Court of Illinois to compel respondent to sign the particular report of proceedings prepared by counsel for petitioner.

Respondent signed, sealed and certified a true, correct and complete report of proceedings and ordered the same to be filed, and the same was filed.

The Supreme Court of Illinois denied the writ of mandamus.

SUMMARY OF ARGUMENT.

1. This Court does not have jurisdiction under Sec. 237 (b) of the Judicial Code (28 U. S. C. A., Sec. 344).

(a) There is no substantial Federal question. The opinion of the Supreme Court of Illinois concerns pleading and procedural issues, as to which the decision of the State Court is final. The questions are not of general or wide importance.

(b) The Federal questions were not properly raised and preserved. Reference to the "equal protection question" in the pleadings is vague. Reference to the "equal protection" and "due process" questions in petitioner's state court brief is improper. Petitioner, by relying upon state constitutional questions, abandoned his Federal questions.

(c) It was not necessary for the Supreme Court of Illinois to decide, and the state court did not decide, the Federal questions presented in the petition for writ of certiorari.

(d) A basis for the decision of the Supreme Court of Illinois is upon the non-federal ground, namely, of its construction as to effects of writs of mandamus. This ground is broad enough to maintain the judgment of the state court, independently of any decision on Federal questions.

2. There is no merit in the reasons advanced by petitioner for granting certiorari. *Milkwagon Drivers* v. *Meadowmoor*, 61 S. Ct. 551 (1941) has no present application. The state court decision merely settles a pleading problem. The opinion of the Illinois Supreme Court follows established Illinois precedents, and it is in conformity with decisions of other state courts and of the United States Supreme Court. This Court will not prescribe legislation.

ARGUMENT.

I.

This Court does not have jurisdiction.

Petitioner has not complied with the Rules of this Court (Rule 38, par. 2 and Rule 12 (1), subpar. 3) as to the contents of the jurisdictional statement to be incorporated in a petition for writ of certiorari, having failed to set forth the appropriate statutory provision conferring jurisdiction upon this Court.

However, it is believed that the following section is being relied upon to confer jurisdiction.

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination * * * any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution * * * of the United States." Sec. 237 (b), Judicial Code (28 U.S.C.A. sec. 344).

This Court does not have jurisdiction under the express terms of the quoted statutory enactment for the reasons set forth below.

(a) No substantial Federal question.

There is no substantial Federal question involved in the decision of the Supreme Court of the State of Illinois.

The two elements in the state court decision concern: (1) a simple pleading proposition as to the nature of a demurrer, and (2) a local procedural issue as to the jurisdiction of that court to award mandamus, with dicta as to the scope of such writ in a proper case.

Thus, in fact, the state court decision does not involve any Federal question at all.

This Court has repeatedly held that a decision by the state court on a question of pleading or procedure in their court is final.

> *Texas Ry.* v. *Miller,* 221 U. S. 408, 416 (1910).
> *Brinkmeir* v. *Mo. Pac. Ry.,* 224 U. S. 268 (1911).
> *Wood* v. *Chesborough,* 228 U. S. 672 (1912).
> *Perryman* v. *Woodward,* 238 U. S. 148 (1915).
> Robertson and Kirkham, Jurisdiction of the Supreme Court, (1936 ed.), sec. 96.

A casual analysis of the purported Federal questions raised in the petition for writ of certiorari is sufficient to demonstrate that those questions are unsubstantial.

The questions are narrow in scope, involving merely a matter of practice under the pleadings of this particular case and a matter of local state practice as to appellate procedure.

There is no showing that the Federal questions raised are of general and wide importance.

The questions raised by petitioner are so wholly devoid of merit as to be frivolous. *New Orleans Waterworks* v. *Louisiana,* 185 U. S. 336, 345 (1901).

(b) Federal questions not properly raised.

Petitioner emphasizes that the "equal protection question" was pointed out to the Supreme Court of Illinois

in a motion to vacate an order closing the pleadings (Petition, pp. 7, 8). However, such bland reference to a Federal question in this motion to vacate, unsupported by any clear argument or authorities, is too vague and general to confer jurisdiction upon this Court. *Harding* v. *Illinois,* 196 U. S. 78 (1904).

Petitioner's statement that the "equal protection question" was raised also in the first brief filed in the Illinois Supreme Court (Petition, p. 8) is misleading. Petitioner's reference is merely to a point in his brief that the state appellate "procedure" is contrary to the due process clause of the Fourteenth Amendment to the United States Constitution. In that brief there is no specific claim of denial of equal protection of the laws or of the equal protection clause of the Fourteenth Amendment. Petitioner's reference to his brief, even if proper, is insufficient to confer jurisdiction upon this Court.

Hiawassee Power Co. v. *Carolina-Tenn. Co.,* 252 U. S. 341 (1919)
Marvin v. *Trout,* 199 U. S. 212, 223 (1905)

The "due process question" before this Court is stated by petitioner to have been raised for the first time in his brief filed in the state court (Petition, p. 8). Petitioner also refers to the "equal protection question" in that brief. This Court has repeatedly held that briefs presented to the state court, even if printed in the Supreme Court record, "form no part of the record" and, thereby, a claim of jurisdiction cannot be sustained "by reference to briefs and statements which are not part of the record." *Zadig* v. *Baldwin,* 166 U. S. 485, 488 (1897).

Lynch v. *New York,* 293 U. S. 52, 54 (1934)
Harding v. *Illinois,* 196 U. S. 78 (1904).
Live Oak Assn. v. *R.R. Commr.,* 269 U. S. 354 (1925)

Although respondent is hesitant to refer to any briefs filed by petitioner in the state court proceedings, it may be ascertained readily from his last brief filed therein that no Federal question was finally urged by petitioner for consideration by the Supreme Court of Illinois. His concluding appeal was as follows:

> "* * * we are confident that this court will, to that end, decide this case upon the entire record, in accordance with Sections 19 and 20 of Article 2 of the Constitution of 1870." (Reply Brief on Behalf of Relator, p. 7).

Thus, even if petitioner in some fashion had raised any Federal questions it is clear from the last statement of his position in the state court referring to the Illinois Constitution that any such Federal questions had been expressly waived and abandoned.

Harding v. *Illinois*, 196 U. S. 78, 88 (1904)
Hulbert v. *Chicago*, 202 U. S. 275 (277), 280 (1905)

(c) Decision of Federal questions not necessary to state court decision.

It is encumbent upon petitioner to demonstrate not only that the Federal questions were presented for decision to the Supreme Court of Illinois but that the Federal questions were actually decided, or that judgment as rendered could not have been given without deciding them, and that such decision of the Federal questions were necessary to the determination of the cause. *Lynch* v. *New York*, 293 U. S. 52 (1934); *Southwestern Bell* v. *Oklahoma*, 303 U. S. 206 (1938).

Such showing cannot be made here. No Federal question was actually decided. Judgment as rendered could

have been, and was, given without any decision on the Federal questions stated in the petition for writ of certiorari. The Supreme Court of Illinois stated in its opinion:

> "It is not competent for this court to try the question of fact and determine for the trial judge matters that are left to his legal discretion and judgment." *Simus* v. *Donoghue,* 377 Ill. 122, 125 (1941).

Actually, since the writ of mandamus was denied on the basis of lack of jurisdiction on the part of the Supreme Court of Illinois, the decision in this aspect merely determined a question of state procedure and remedy without any decision as to any Federal questions. The decision involved only a determination of its own jurisdiction.

(d) Decision of the Supreme Court of Illinois rests upon non-federal grounds independently and adequately supporting its judgment.

Even were this Court to determine that the Federal questions sought to be reviewed were properly presented and preserved in the Supreme Court of Illinois, this Court will not take jurisdiction.

In *Farson, Son & Co.* v. *Bird,* 248 U. S. 268 (1918), involving review of a mandamus suit in which it was contended that the denial of the writ by the state court impaired an obligation of contract in violation of the Constitution of the United States, this Court stated, in dismissing the writ of error for want of jurisdiction:

> "* * * We are of the opinion that when correctly tested it becomes apparent that the action of the court below involved only a ruling upon a question of remedy resting upon considerations of law broad enough to sustain the conclusion reached without any reference to the federal questions which were raised and relied upon" (p. 271).

This Court has often stated:

> "It is settled law, that where the record discloses that the judgment of a state court was based, not alone upon a ground involving a federal question, but also upon another and independent ground, broad enough to maintain the judgment, this court will not take jurisdiction to review such judgment and will dismiss a writ of error brought for that purpose." *Doyle* v. *Atwell,* 261 U. S. 590, 592 (1923).

A decision as to the effects of writs of habeas corpus was regarded as broad enough in the *Doyle* case to maintain the judgment of the lower court, independently of its decision as to the constitutional question in that case, and the writ of error was dismissed. The decision of the Supreme Court of Illinois in the instant case can only be regarded in its proper light as a decision as to the effects of writs of mandamus. This decision is broad enough to maintain the state court judgment denying the writ, independently of any alleged decision as to constitutional questions.

II.

The reasons advanced by petitioner for granting the petition for writ of certiorari are without merit.

The reasoning relied on in the first paragraph for allowance of certiorari (Petition, p. 9) to the effect that petitioner may be compelled to appeal upon a false record has no present application. The petition for writ of certiorari seeks to review the judgment denying a writ of mandamus and is not an appeal from the judgment fining petitioner.

The *Meadowmoor* case (*Milkwagon Drivers* v. *Meadowmoor,* 61 S. Ct. 551 (1941)) has no relevancy in the solution of any issues before this Court.

In the second paragraph, the reasons advanced under the guise of an equal protection label do not set forth any basis for disturbing the decision of the state court. The decision in this regard only resolves the solution of a pleading problem in conformity with recognized state practice; and, therefore, the reasons advanced are insufficient for this Court to afford review.

The due process reasons asserted by petitioner in his third paragraph on page 10 of his petition for writ of certiorari are patently erroneous. The decision in the instant case follows a long line of Illinois precedents, among which are the cases cited in the state court opinion (*People* v. *Williams,* 91 Ill. 87 (1878), *People* v. *Anthony,* 129 Ill. 218 (1889)) and recent cases such as *Hooper* v. *Rooney,* 293 Ill. 370 (1920) and *Bauman* v. *C.I.T. Corp.,* 356 Ill. 336 (1934). In the *Bauman* case, the Supreme Court of Illinois stated:

> "The judge may resort to all legitimate means of information to ascertain the accuracy of the bill he is requested to certify . . . It is the exclusive province of the judge before whom the cause was tried to determine the accuracy of the bill of exceptions presented for his signature . . . The law makes him the judge of the accuracy and propriety of the act he is called upon to verify, and it is not for other persons to determine its truth" (p. 339).

The decision of the Supreme Court of Illinois is in harmony with the decisions of the highest courts of many other states.

> "It seems to be settled that mandamus is the proper remedy to compel the signing of a bill of exceptions, not to require the trial judge to insert any particular matter in the bill, but to sign a bill of exceptions which he approves as being correct." *Springfield* v. *Fulk,* 96 Ark. 317 (1910).

> "This court has no power to compel a trial justice to do anything more than consider a bill of exceptions. It cannot compel him to sign a bill which, in his opinion, is not in conformity with the rules. It is an act of judicial discretion which this court cannot control." *Hight* v. *McCoy*, 46 App. D. C. 238 (1917).

The fundamental rationale of the decision of the Supreme Court of Illinois is in conformity with reasoning advanced by this Court in its decision in *Bank* v. *Sweeny*, 1 Pet. 567 (1828). In that case the facts disclose that it was the practice to have an execution issue for bank debts first and upon its return, if the debt were disputed, the court was to order an issue to be made up and try the action. This Court stated:

> "In the present case, the Circuit Court did not refuse to direct such an issue to be made up, which had they refused to do, a *mandamus* would have been the proper process to compel that to be done which the act requires. But the Circuit Court did direct an issue, and allow a plea of limitations.
>
> "The application now is that the circuit court be ordered to withdraw that issue, and to direct a different issue to be made up according to what counsel for the bank supposes to be a proper construction of the act.
>
> "We think this is not a proper case for a mandamus • • •."

To the same effect is *Ex parte Bradstreet*, 4 Pet. 102 (1830).

Reasons by petitioner in his fourth paragraph (Petition, pp. 10-11) as to the lack of an Illinois statute are of no merit. This Court will not enact or prescribe legislation and usurp the functions of a state legislature. Petitioner, in adhering to his reasoning, should apply to the legislature for a change in state procedural practice as to the settling

of a report of proceedings and cannot seek such a change by judicial action.

That the Illinois legislature has designated a practice whereby, by rules of the Supreme Court of Illinois, the trial judge settles a report of proceedings is a matter of state policy and legislative wisdom that this Court will not disturb. In fact, in this case the respondent, as trial judge, settled the report of proceedings after hearing testimony of bystanders.

There is no question that the present state practice complies with the constitutional safeguards prescribed under the Fourteenth Amendment.

CONCLUSION.

Although mere matters of procedure in a state court are not subject to review in this Court, it is proper to point out that the procedure followed has not deprived petitioner of any right. The judgment of the Supreme Court necessarily would have been the same, had leave been given to file the reply.

Upon the petition for mandamus alone, the Supreme Court could only have ordered respondent to certify and file *a* true and correct report of proceedings, not a *tendered* one, and upon the petition, answer of respondent, motion of petitioner to strike, reply and showing in support thereof, the same judgment only could have been rendered.

It not being contended that respondent has not filed a report of proceedings certified by him to be true and correct, there could be no judgment except that the writ be denied.

There are no matters involved in this case that call for the exercise of this Court's discretionary powers.

Not only are there no grounds set forth in the petition for writ of certiorari for the exercise of jurisdiction by this Court, but the reasons advanced to grant certiorari are essentially without merit.

Respondent urges that the writ of certiorari be denied.

Respectfully submitted,

DAVID SILBERT,
Attorney for Respondent.